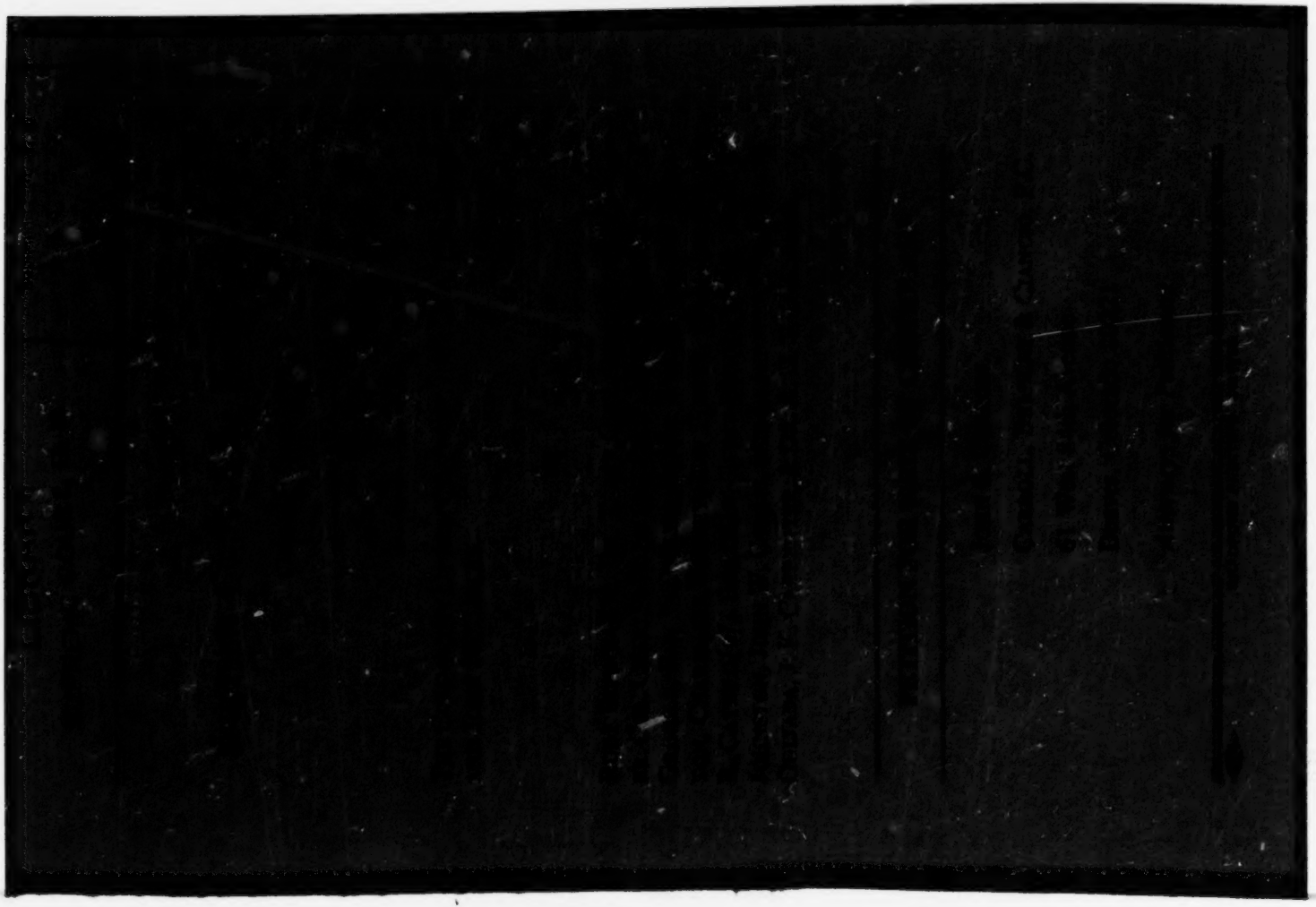


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IN THE

Supreme Court of the United States

October Term, 1974

No. .....

THE COMMODITY OPTION COMPANY, INC., D. A. HARTNESS, AND JOHN MCGINLEY,

Petitioners,

VS.

RUDY BERNHARDT, DR. TERRY COLLINSON, ROBERT FRASER, COL. CHARLES HAIRSTON, DR. JAMES R. KENNEDY, MAX GRINDLE, ROY PRANGLEY, ELMER WOLFE, DR. JIM WORLTON, CHARMAINE BARNEY, RAY FOSTER, JOHN FARADY, H. R. CATEY D/B/A BOZEMAN, CATEY WYNN CAPERS, MONT S. JOHNSTON, JOHN W. CORLIS, SAM L. JEFFERS, DR. IGNACIO QUIJADA, J. K. CARPENTER, & DR. A. H. VAN DERHOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Colorado entered on December 16, 1974.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Colorado is *Bernhardt v. Commodity Option Company, Inc.*, 4 *Colo. Lawyer* 377, 528 P.2d 919 (1974). As yet the opinion has not been printed in the official *Colorado Reports*. This opinion is printed in Appendix A.

JURISDICTION

The opinion of the Supreme Court of Colorado was dated December 2, 1974. Rehearing was denied and judgment entered on December 16, 1974. No order granting any extension of time within which to petition for a writ of certiorari has been entered. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1257(3).

QUESTIONS PRESENTED

1. Is Rule 102 of the *Colorado Rules of Civil Procedure* pertaining to pre-judgment attachments unconstitutional as a denial of due process of law?

2. Is Rule 103 of the *Colorado Rules of Civil Procedure* pertaining to pre-judgment garnishments unconstitutional as a denial of due process of law?

3. Is a "local rule" or "directive" that applies in only one county out of 63 counties in the State of Colorado a denial of equal protection of the laws?

PROVISIONS OF THE UNITED STATES CONSTITUTION AND COLORADO RULES OF CIVIL PROCEDURE

The provisions of the *United States Constitution* that is invoked are the due process and equal protection clauses of the Fourteenth Amendment. The rules which the petitioners allege to be unconstitutional are *Colo. R. Civ. P.* 102 and 103, which appear in volume 7 of the *Colorado Revised Statutes* of 1973 at pp. 485-490 and 499-503. This constitutional provision and these rules are printed in Appendix B.

STATEMENT

The respondents Bernhardt *et al.* sued the petitioners Commodity Option Company *et al.* for breach of contract and

caused attachments and garnishments to issue against the petitioners' bank accounts before judgment, without prior notice, and without a prior hearing. The petitioners moved to dissolve the writs, and the trial court granted the motion, holding both Rules 102 and 103 of the *Colorado Rules of Civil Procedure* to be contrary to the due process clause in the Fourteenth Amendment to the *United States Constitution.*

The Supreme Court of Colorado held that a note posted on the bulletin board in the El Paso County District Court clerk's office cured any constitutional flaws in these two rules. First calling this note on the bulletin board a "local rule" and then on rehearing calling it a "directive," the Supreme Court of Colorado quoted it:

> If the writ of garnishment is asked for *in connection* WITH THE ISSUANCE OF A WRIT OF ATTACHMENT, the clerks will *NOT* issue the writ of garnishment but will send counsel to the Judge to whom the case is assigned for the JUDGE TO ISSUE THE WRIT OF GARNISHMENT if he wants to in the face of the U.S. Supreme Court ruling in *SNIADACH v. FAMILY FINANCE CORP.*, 89 Sup.Ct. 1829 (1969). [Capitalization and emphasis by the court.]

Then the Supreme Court of Colorado held that for cases pending in El Paso County this notice in effect amended *Colo. R. Civ. P.* 103(d), which says that "the writ of garnishment shall be issued by the sheriff," and *Colo. R. Civ. P.* 102(d), which says that "the clerk shall issue a writ of attachment." Then the Supreme Court of Colorado held that this makeshift procedure was due process because of judge, not the sheriff, had signed the writ of garnishment. There was no hearing before the judge signed the writ of garnishment, and there was no notice to the petitioners before the writ of garnishment issued. (Please see Appendix C.)

REASONS FOR GRANTING THE WRIT

As this Court will note from the Colorado Supreme Court's opinion, the Colorado Supreme Court erroneously ruled that *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), applies only to garnishments of wages and erroneously held that *Mitchell v. W. T. Grant*, 416. U.S. 600 (1974), vitiated both *Sniadach* and *Fuentes v. Shevin*, 407 U.S. 67 (1972). The error of the Supreme Court of Colorado appears plainly from *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 41 L.W. 4192 (Jan. 22, 1975).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Colorado in *Bernhardt v. Commodity Option Company, Inc.*

MR. CHIEF JUSTICE PRINGLE delivered the Opinion of the Court.

Plaintiffs-appellants brought an action in the district court for breach of contract alleging *inter alia,* that the defendant Commodity Option Company failed to exercise certain options on plaintiffs' behalf. The complaint was subsequently amended to include claims for conversion, fraud, and violation of federal and state security laws. Along with the filing of the complaint, plaintiffs filed an affidavit in attachment, and an attachment bond. The affidavit in attachment alleged:

> "That Defendants are about to remove their property or effects, or a material part thereof, out of this state, with intent to defraud or hinder or delay their creditors, or some one or more of them, or to render process of execution unavailable when judgment is obtained; and
>
> "That Defendants fraudulently contracted the debts respecting which the suit is brought, or by false representation or false pretenses or by fraudulent conduct, procured money of Plaintiffs."

On July 9, 1973, the clerk of the El Paso District Court issued a Writ of Attachment; on the same date, and pursuant to a local practice, the district court Judge, Hon. John F. Gallagher, issued a writ of garnishment, which was then served upon several banks thus freezing defendants' accounts.

Thereafter, defendants moved to dissolve the writs on the ground that the Colorado rules on attachment, C.R.C.P. 102, and garnishment, C.R.C.P. 103, are unconstitutional in that they allow a plaintiff to deny a defendant the use of his property without notice and a hearing, and that such denial

constitutes a deprivation of defendants' property without due process of law. The district court agreed, and ordered the writs dissolved. We reverse.

Plaintiff argues that because this case involves a pre-judgment garnishment of defendants' bank accounts, as opposed to wage garnishment, the prohibition in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349, against pre-judgment wage garnishment without prior notice and a right of the defendant to be heard, does not apply. Therefore, plaintiff argues the Court is free to adopt a more flexible approach in determining what process is due in this situation. Defendant asserts that C.R.C.P. 102 and 103 cannot withstand constitutional scrutiny and should be struck down under the guidelines enunciated in *Sniadach, supra*, and *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556. We find that the procedure followed in this case was consistent with the requirements of the due process clause.

We point out, at the outset, that there was in effect at the time of this attachment and garnishment a practice in the trial court represented by its following directive:

> "If the writ of garnishment is asked for *in connection* WITH THE ISSUANCE OF A WRIT OF ATTACHMENT, the Clerks will NOT issue the writ of garnishment but will send counsel to the Judge to whom the case is assigned for the JUDGE TO ISSUE THE WRIT OF GARNISHMENT if he still wants to in face of the U.S. Supreme Court ruling in SNIADACH V. FAMILY FINANCE CORP., 89 Sup. Ct. 1820 (1969)."

The writ here was issued by a judge in accordance with that directive.

We note that this case involves the garnishment of de-

fendants' bank accounts, and therefore does not come within the ambit of the situation present in *Sniadach, supra.* There, the Court specially noted that the type of property sought to be attached is an important factor to consider in determining whether the procedure used provided the defendant with due process. The Court there pointed out that

> "We deal here with wages — a specialized type of property presenting distinct problems in our economic system." *Sniadach v. Family Finance Corp.*, 395 U.S. at 340.

Nevertheless, defendant argues that *Fuentes v. Shevin, supra,* and its sweeping requirement that there be an adversary hearing before an individual may be temporarily deprived of his property, is controlling in this case. However, read in conjunction with the recent case of *Mitchell v. W. T. Grant,* —— U.S. ——, 94 S.Ct. 1895, 40 L.Ed. 2d 406 (1974), it becomes very questionable whether the generalizations made in *Fuentes* have any vitality today.

In *Mitchell,* the Supreme Court upheld Louisiana's sequestration statute against a due process argument even though it allowed for a seizure of propery without any notice to the debtor, and with an opportunity for a hearing only after the seizure took place. The weighing and balancing of the competing interests, and the consideration of procedural safeguards that the Court undertook in *Mitchell,* is appropriate here and leads us to the same result.

In Colorado, a writ of garnishment can only be issued after the issuance of a writ of attachment. C.R.C.P. 103(b). C.R.C.P. 102 allows an individual, upon the filing of a complaint, to acquire a writ of attachment in certain enumerated instances. C.R.C.P. 102(b). Execution of the writ serves as a lien on specified property throughout the duration of the litigation, thus securing for the plaintiff the practicality of benefitting from any judgment he might be awarded. In this

case, where the affidavit alleged fraud and the secretion or removal of assets with the intent to defraud, the benefit of the attachment statute to the plaintiff is obvious. On the other hand, garnishment of defendants' bank accounts freezes those accounts, thus denying to defendants the right to use those monies. That this is a deprivation of defendant's property, or right to the use of his property is beyond question. Nevertheless, the procedure employed in this case provided defendants with sufficient protection so as to comport with the requirements of the due process clause.

First, C.R.C.P. 102(c) requires that the plaintiff must put up a bond in double the amount that he is claiming. Thus, "if the defendant recover judgment, or if the Court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the wrongful suing out of the attachment . . ." C.R.C.P. 102(c). Second, C.R.C.P. 102(p) allows the defendant, within 20 days after the service of the writ of attachment upon him, to traverse by affidavit, and "put in issue the matters alleged in the affidavit upon which the attachment is based." C.R.C.P. 102(p). Therefore, by traverse, the defendant can require the plaintiff to substantiate the causes alleged in his affidavit, and if he does not, the attachment (and hence the garnishment) is dissolved. Third, C.R.C.P. 102(y) allows the defendant to apply for the discharge of the attachment if the writ was improperly issued for any reason appearing on the face of the papers and proceedings in the action. Finally, C.R.C.P. 102(w) allows the defendant to post his own bond and have released to him "any money in the hands of the clerk or any property in the hands of the sheriff." C.R.C.P. 102(w).

In sum, the requirement of the bond to insure against costs and damages to the defendant, the ability of the defendant to

get an immediate hearing by means of a traverse, the availability of an application for discharge, and the opportunity available to the defendant to have the property released by posting his own bond, are significant procedural safeguards for the defendant. In addition, in this case the defendant was "not at the unsupervised mercy of the creditor and court functionaries," *Mitchell v. W. T. Grant,* —— U.S. ——, —— S.Ct. ——, 40 L.Ed. 2d at 406, for the local practice of the El Paso County District Court requires that the writ of garnishment can only be issued by a judge, as was done in this case. Therefore, as in *Mitchell,* there was "judicial control of the process from beginning to end." 40 L.Ed 2d at 406.

While the enhanced protection afforded by the local practice obviates the necessity of our ruling on the constitutionality of C.R.C.P. 102 and 103, it is noteworthy that an attachment procedure similar to Colorado's has been upheld as comporting with the requirements of the due process clause. *McKay v. McInnes,* 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975. That *McKay* has either been reincarnated or never died is indicated by the manner in which it is cited and discussed by the Court in *Mitchell* in limiting *Sniadach* and *Fuentes* to the special situations there present.

We therefore find that the procedure employed in this case was consonant with the due process clause of the Fourteenth Amendment.

The order of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

MR. JUSTICE DAY does not participate.

APPENDIX B

Constitutional and Rule Provisions:

(1) *U.S. Const.* amend. 14: "No State shall . . . deprive any person of life, liberty, or property, without due process of law.

(2) *U.S. Const.* amend. 14: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

(3) *Colo. R. Civ. P.* 102:

RULE 102. ATTACHMENTS

a) Any Time Before Judgment; Security in Lieu of. The plaintiff, at the time of issuing the summons or filing the complaint in an action on contract, express or implied, or in an action to recover damages for any tort committed by a nonresident of this state, against the person or property of a resident of this state, or at any time afterward before judgment, may have the property of the defendant, not exempt from execution, attached as security for any judgment that may be recovered in such action, in the manner prescribed in this Rule, unless the defendant shall give good and sufficient security to secure the payment of such judgment.

(b) Affidavit; Causes. No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of the court in which the action is brought, an affidavit setting forth that the defendant is indebted to plaintiff, or that the defendant is liable in damages to plaintiff for a tort committed by a nonresident of this state against the person or property of a resident of this state, stating the nature and amount of such indebtedness or claim for damages as near as may be, and alleging any one or more of the following causes for attachment, viz.:

(1) That defendant is not a resident of this state;

(2) That the defendant is a foreign corporation;

(3) That the defendant is a corporation whose chief office or place of business is out of the state;

(4) That the defendant conceals himself, or stands in defiance of an officer, so that process of law cannot be served upon him or that the defendant has for more than four months been absent from the state, or that for such length of time his whereabouts have been unknown, and that the indebtedness or the claim for damages mentioned in the affidavit has been due or has existed during all the said period;

(5) That the defendant is about to remove his property or effects or a material part thereof, out of this state, with intent to defraud or hinder or delay his creditors, or some one or more of them, or to render process of execution unavailable when judgment is obtained;

(6) That the defendant has fraudulently conveyed or transferred or assigned his property or effects, so as to hinder or delay his creditors, or some one or more of them, or to render process of execution unavailable when judgment is obtained;

(7) That the defendant has fraudulently concealed or removed or disposed of his property or effects, so as to hinder or delay his creditors, or some one or more of them, or to render process of execution unavailable when judgment is obtained;

(8) That the defendant is about to fraudulently convey or transfer or assign his property or effects so as to hinder or delay his creditors, or some one or more of them, or to render process of execution unavailable when judgment is obtained;

(9) That the defendant is about to fraudulently conceal or remove or dispose of his property or effects so as to hinder

or delay his creditors, or to render process of execution unavailable when judgment is obtained; or that such debtor has departed, or is about to depart from this state, with the intention of having his effects removed from the state;

(10) That the defendant has failed or refused to pay the price or value of any article or thing delivered to him which he should have paid for upon delivery thereof;

(11) That the defendant has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff at the instance of the defendant, and which should have been paid at the completion of such work or when services were fully rendered;

(12) That the defendant fraudulently contracted the debt, or fraudulently incurred the liability respecting which the suit is brought, or by false representation or false pretenses or by any fraudulent conduct, procured money or property of the plaintiff.

(c) Plaintiff to Give Bond. Before issuing the writ of attachment the clerk shall require the plaintiff to furnish for his approval, a written undertaking, by a corporate surety company or by two or more sufficient sureties, in a sum not less than double the amount claimed by the plaintiff, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the wrongful suing out of the attachment, not exceeding the sum specified in the undertaking. The defendant may require the sureties to satisfy the clerk that each, for himself, is worth the amount for which he has become surety over and above his just debts and liabilities, in property not by law exempt from execution in this state.

(d) Clerk Issues Writ of Attachment. Where an affidavit is

made and filed and bond approved, as aforesaid, the clerk shall issue a writ of attachment, directed to the sheriff of any county, returnable like other writs or process in this Rule, commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys, and effects of said debtor, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, with interest and costs, in whose hands or possession the same may be found.

(e) Contents of Writ. The writ shall be directed to the sheriff of any county in which the property of such defendant may be, and require him to serve a copy of the writ on the defendant if found in such county, and to attach and safely keep all the property of such defendant within such county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the affidavit. If the defendant deposit the amount of money claimed by the plaintiff or give and furnish security by an undertaking approved by the sheriff of a corporate surety company or of at least two sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached, the sheriff shall take such money or undertaking in lieu of the property. Several writs may be issued at the same time, or alias writs may issue at any time to the sheriffs of different counties.

(f) Service; How Made. The writ of attachment shall be served in like manner and under the same conditions as are provided in these rules for the service of process, except that if personal service be made in the state of Colorado, it shall be made by the sheriff. Service shall be deemed completed upon the expiration of the same period as is provided for service of process.

(g) Execution of Writ. The sheriff to whom the writ is directed and delivered, shall execute the same without delay, as follows:

(1) Real property standing upon the records of the county in the name of the defendant, shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county;

(2) Real property, or any interest therein belonging to the defendant, and held by any person, or standing upon the records of the county in the name of any other person, but belonging to the defendant), shall be attached by leaving with such person or his agent, if either be found in the county, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county;

(3) Personal property capable of manual delivery shall be attached by taking it into custody.

(h) Return of Writ. The sheriff shall return the writ of attachment within twenty days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto, making a full inventory of the property attached as a part of his return upon the writ.

(i) Execution of Writ on Sunday or Legal Holiday. If an affidavit is filed with the clerk stating that it is necessary to execute the writ of attachment on Sunday or on a legal holiday, to secure property sufficient to satisfy the judgment to be obtained, the clerk shall endorse on the writ an order to the officer directing the writ to be executed on such day.

(j) No Final Judgment Until Thirty Days After Levy.

(1) **Creditors.** No final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of thirty days after such levy has been made; and any creditor of the defendant making and filing within said thirty-day period an affidavit and undertaking, as hereinbefore required of the plaintiff, to-

gether with his complaint setting forth his claim against the defendant, shall be made a party plaintiff and have like remedies against the defendant to secure his claim as the law gives to the original plaintiff.

(2) **Judgment Creditors.** Any creditor whose claim has been reduced to judgment in this state, may upon motion filed within said thirty days be made a party and have like remedies against the attached property. Such judgment creditor shall not be required to make or file an affidavit, undertaking, complaint, or have summons issue, provided, that any such judgment creditor may be required to prove to the satisfaction of the court that his judgment is bona fide and not in fraud of the rights of other creditors.

(k) Dismissal by One Creditor Does Not Affect Others. After any additional creditor has been a party to the action, as hereinbefore provided, a dismissal by the first or any subsequent attaching creditor of his cause of action, or proceedings in attachment, shall not operate as a dismissal of the attachment proceedings, as to any other attaching creditor; but the remaining creditors may proceed to final judgment therein the same as though no such dismissal had been made.

(l) Final Judgment Prorated; When Creditors Preferred. The final judgment in said action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found by the court to be due, together with his costs; and the money realized from the attachment proceedings, after paying all costs taxed in the attachment action, shall be paid to the participating creditors in proportion to the amounts of their several judgments; and any surplus of such moneys, if any, shall be paid to the defendant by order of the court, upon proof thereof. Provided, when the property is attached while the defendant is removing the same or after the same has been removed from the county, and the same is overtaken and re-

turned, or while same is secreted by the defendant, or put out of his hands, for the purpose of defrauding his creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors.

(m) Insolvent Defendant; Creditors Prorate. Whenever it shall satisfactorily appear to the court, that levies of writs of attachment have been made upon the property of the defendant sufficient to render the defendant in such suit insolvent, the court shall upon application, order that writs of attachment may issue in suits upon contracts, express or implied, not yet due, in order that such attaching creditors may prorate upon the attached property and the proceeds thereof under this Rule; provided, that any judgment obtained under the provisions of this section shall be with a rebatement of the interest, if any, from the time such judgment is rendered until the time at which said debt or liability would become due.

(n) When Suit Transferred to District Court.

Repealed, effective January 12, 1965.

(o) Attachment Upon Debts Not Due. Actions may be commenced and writs of attachment issued as prescribed in this Rule upon debts or liabilities not yet due, if the affidavit states any of the causes mentioned, except subsections (b) (1), (2), (3); provided that any judgment obtained under the provisions of this section shall be with a rebatement of the interest, if any, from the time such judgment is rendered until the time at which said debt or liability would become due.

(p) Traverse of Affidavit. The defendant, within twenty days after the service of the writ of attachment upon him, may by affidavit, traverse and put in issue the matters alleged in the affidavit upon which the attachment is based; and if the plaintiff shall substantiate any one of the causes alleged in

his affidavit, the said attachment shall be sustained, otherwise the same shall be dissolved. If the debt for which the action is brought is not due and the attachment is not sustained, the action shall be dismissed; but if the debt is due, the action may proceed to judgment after the attachment is dissolved, as in other actions where no attachment is issued. If the defendant fails to traverse the plaintiff's affidavit within said twenty days, the attachment shall be deemed sustained, but it shall not be necessary to have an actual return of the writ before resorting to service by publication or to personal service out of the state, provided the other requisites of constructive service are complied with.

(q) Amendment of Affidavit. If on the trial of issues formed by a traverse of an affidavit for attachment it shall appear that the evidence introduced does not prove the cause or causes alleged in the affidavit, but the evidence does tend to prove another cause of attachment, then on motion the affidavit may be amended to conform to proof the same as pleadings are allowed to be amended in cases of variance.

(r) Intervention; Damages. Any third person claiming any of the property attached, or any lien thereon or interest therein, may intervene under the provisions of Rule 24, and in case of a judgment in his favor may also recover such damages as he may have suffered by reason of the attachment of the property.

(s) Perishable Property May Be Sold. Where property taken under execution, attachment, garnishment, or replevin, or seized under order of court, is in danger of serious and immediate decay or waste, or likely to depreciate rapidly in value pending the determination of the issues, or, where the keeping of it will be attended with great expense, any party to the action may apply to the court, upon due notice for a sale thereof, and, thereupon the court may, in its discretion, order the property sold in the manner provided for in said

order and the proceeds of said sale shall, thereupon, be deposited with the clerk to abide the further order of the court.

(t) Application of Proceeds; Satisfaction of Judgment. If judgment is recovered by the plaintiff or any intervenor, on order of court, all funds previously deposited with the clerk, or in the hands of the sheriff, shall be first applied thereto. If any balance remain due, execution shall issue and be delivered to the sheriff who shall sell so much of the attached property as may be sufficient to satisfy the judgment. Sales shall be conducted as in cases of sales on execution. If there is a personal judgment and after such sale the same is not satisfied in full, the sheriff shall thereupon collect the balance as upon an execution in other cases.

(u) Balance Due; Surplus. Whenever the judgment shall have been paid, the sheriff, upon demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

(v) Procedure When Judgment Is for Defendant. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant, the writ of attachment shall be discharged and the property released therefrom.

(w) Defendant May Release Property; Bond. The defendant may at any time before judgment have released to him any money in the hands of the clerk or any property in the hands of the sheriff, by virtue of any writ of attachment, by executing the undertaking provided for in section (x). All the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall thereupon be released from the attachment and delivered to the defendant upon the delivery and approval of the undertaking.

(x) Conditions of Bond; Liability of Sheriff. Before releasing such attached property to the defendant, the sheriff shall require an undertaking executed by the defendant to the plaintiff approved by the sheriff either of a corporate surety company or with at least two sureties in such sum as may be fixed by the sheriff in not less than the value of the property, to the effect that in case the plaintiff recover judgment in the action, and the attachment is not dissolved, defendant will, on demand, redeliver such attached property so released, to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and surieties will pay to the plaintiff the full value of the property so released. If a sheriff shall release any property held by him under any writ of attachment without taking sufficient bond, he and his sureties shall be liable to the plaintiff for the damages sustained thereby.

(y) Application to Discharge Attachment. The defendant may also, at any time before the time for answer expires, move the attachment be discharged, on the ground that the writ was improperly issued, for any reason appearing upon the face of the papers and proceedings in the action. If on such application it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

(z) New Bond; When Ordered; Failure to Furnish. If at any time where an attachment has been issued it shall appear to the court that the undertaking is insufficient, said court shall order another undertaking, and if the plaintiff shall fail to comply with such order within twenty days after the same shall be made, all or any writs of attachment issued therein shall be quashed. The additional undertaking shall be executed in the same manner as the original, and the sureties therein shall be jointly and severally liable with those in the original undertaking.

(aa) New Trial; Appeal and Writs of Certiorari. Motions

for new trial may be made in the same time and manner, and shall be allowed in attachment and garnishment proceedings as in other actions. Appeals from the county court to the district court and writs of certiorari may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases. Any order by which an attachment or garnishment is released or sustained is a final judgment.

(4) *Colo. R. Civ. P.* 103:

Rule 103. Garnishment

(a) Court Process Shall Not Violate Federal Garnishment Law. No court shall make, execute or enforce any order or process in violation of section 1673 of Title III of the Federal Consumer Credit Protection Act, Public Law 90-321.

(b) When Writ Issues. Any time after the issuance of a writ of attachment the plaintiff may have a writ of garnishment issue and, whether they are due at the time of the service of the writ or are to become due thereafter, attach the credits, effects, debts, choses in action, money, and other personal property of the defendant in the possession or control of any third person, as garnishee, for the security of any judgment the plaintiff may recover in such action against the defendant; provided that no garnishment shall issue for any sum less than the amount fixed by statute.

(c) Garnishee Summoned; When. Whenever in any action a writ of attachment has been issued and delivered to the proper officer, the officer shall, upon the request of plaintiff, summon such person as the plaintiff may direct to answer as garnishee.

(d) Garnishment of Public Official. Garnishee summons directed against any public body, including the state, against whom garnishment is authorized, shall be served upon the officer of such body whose duty it is to issue warrants, checks or money to the defendant in the action. Service of the sum-

mons on such officer shall be made by leaving a copy thereof with him personally, or in the event of his absence from the office, then by leaving a copy thereof in his office with the chief clerk, deputy, or other employee of the office then in charge thereof. Such officer shall answer such summons in the manner provided for answer of garnishee summons by private corporations; provided, however, he need not include as money due, the amount of any warrant or check drawn and signed prior to the time of service of the summons.

(e) Writ Issued by Judge or Clerk; Alias and Pluries Writs. The writ of garnishment shall be issued only by the judge or clerk or a designated deputy clerk of the court. The names of as many individuals, corporations or other persons as are sought to be charged as garnishees, may be inserted in the same or different writs of garnishment; and the writ shall be served and returned by the officer serving the same, in the manner as a summons in the action; and, in like manner alias and pluries writs may be issued, served and returned.

(f) When Jurisdiction Acquired. Service of the writ of garnishment shall give the court jurisdiction of the garnishee.

(g) Interrogatories Answered Under Oath; Failure to Answer. The garnishee shall answer the interrogatories in writing upon oath or affirmation; and upon request of the garnishee the officer serving the writ of garnishment shall administer such oath or affirmation and take and return such answer with the writ or the garnishee may file his sworn answer with the court within the time required by the writ or he shall be deemed in default.

(h) Exemption.

(1) A garnishee shall not be required to set up or plead any exemption for or on behalf of the defendant unless the garnishee is an employer who is required to determine the amount of disposable earnings not subject to garnishment under Federal law.

(2) A defendant in a garnishment proceeding shall not be required to claim an exemption for earnings not subject to garnishment as provided by Federal law, provided, however, that the defendant may file objection to return of the garnishee on the grounds that it does not correctly state the amount subject to garnishment. One issue raised by the objection the court shall determine the correct amount subject to garnishment.

(3) In a garnishment proceeding to attach property other than earnings the defendant who claims an exemption provided by statute may do so in the following manner:

(A) The defendant, his spouse or attorney may file with the clerk of the court from which the writ of garnishment, writ of execution, writ of attachment or other order of court was issued an affidavit to be provided by the clerk, which affidavit shall state the grounds for the exemption.

(i) Garnishee Not Required to Defend Claims of Third Persons. A garnishee who has notice of the claim of a third person to any goods, chattels, choses in action, credits, money, or effects of the defendant in his possession or control shall not be required to defend on account of such claim, but he shall state in his answer that he is informed that such goods, chattels, choses in action, credits, money, or effects are claimed by such person. When such an answer has been filed the court shall issue a summons to the alleged claimant, which shall be served as provided in Rule 4, requiring him to appear within the time specified in Rule 12 for answer and set up and defend his claim or be thereafter barred. The garnishee may, at the time of filing his answer or at any time thereafter, surrender to the court the goods, chattels, choses in action, credits, money, or effects so claimed, and, upon service of the summons upon the alleged claimant, as hereinbefore provided, he shall hereupon be released and discharged from all liability to any person on account thereof.

(j) Garnishee to Deliver Property; Sale; Judgment. If the answer of the garnishee shows that he has personal property of any kind in his possession, or under his control, belonging to the defendant, the court shall enter judgment that the garnishee deliver the same to the sheriff; and if the plaintiff recover judgment against the defendant in the action, such property, or so much thereof as may be necessary, shall be sold as upon execution, and the proceeds applied towards the satisfaction of such judgment, together with the costs of the action and proceedings; and if there is a surplus of such property, or of the proceeds thereof, it shall be restored to the defendant. If the answer shows that the garnishee is indebted to the defendant, then, if the plaintiff recover judgment against the defendant in the action, the court shall also enter judgment in favor of the defendant for the use of the plaintiff against the garnishee for the amount of the indbtedness admitted in the answer; provided, the judgment against the garnishee shall not be for a greater sum than is necessary to satisfy the judgment of the plaintiff against the defendant, together with costs as aforesaid; and in no case shall the garnishee be chargeable with costs unless his answer shall be successfully controverted, as hereinafter provided.

(k) Garnishee Released Upon Delivery of Property. In all cases the garnishee, upon making answer, may deliver to the officer serving the writ, the property belonging to the defendant, together with the money due to the defendant, as shown by the answer, and the officer shall make return of such property and money with the writ to the court, to be dealt with as provided in the foregoing section; and thereupon the garnishee shall be relieved from further liability in the proceedings, unless his answer shall be successfully controverted, as hereinafter provided.

(l) Refusal of Garnishee to Answer; Default; Judgment. If the garnishee, having been duly served with the writ of garnishment and interrogatories, refuses or fails to answer

the interrogatories within the time required, the plaintiff may enter a default against him and proceed before the court to prove the liability of the garnishee (and in such case the garnishee may be compelled to give testimony as a witness as in other cases), and upon a finding in that behalf, the plaintiff may have judgment entered the same as if the garnishee had answered according to such finding; and if the finding charge the garnishee with any liability, the plaintiff may recover the costs of the proceedings against him, otherwise the garnishee shall be discharged without costs.

(m) Traverse of Answer. If the garnishee answer, the plaintiff may within twenty days after the expiration of the time allowed for the filing of such answer, reply traversing the same; and may allege any matter which would charge the garnishee with liability. If the plaintiff fails to reply within the time aforesaid, he shall be deemed to have accepted the answer of the garnishee as true, and judgment shall be entered accordingly.

(n) Trial of Traverse Issue; Judgment. New matter in the reply shall be taken as denied or avoided and judgment shall be entered upon the finding thereon; provided, if the finding be as favorable to the garnishee as his answer he shall recover costs of the proceeding against the plaintiff, otherwise the plaintiff may recover costs against the garnishee.

(o) Intervention by Motion. Any person other than the garnishee or the parties to the action, who claims any credits, effects, debts, choses in action, or other personal property or any interest therein with which any garnishee is sought to be charged, may at any time before the garnishment proceedings are determined, intervene as provided in Rule 24.

(p) Garnishee May Claim Set-off. Every garnishee shall be allowed to retain or deduct out of the property, effects or credits of the defendant in his hands, all demands against the plaintiff and all demands against the defendant of which he

could have availed himself if he had not been summoned as garnishee, whether the same are at the time due or not, and whether, by way of set-off on a trial, or by the set-off of judgments or executions between himself and the plaintiff and defendant, severally, and he shall be liable for the balance, only after all mutual demands between himself and plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries; provided, that the finding shall show in all cases against which party, and the amount thereof, any set-off shall be allowed, if any shall be allowed.

(q) Garnishee Not Liable on Instruments Not Due. No garnishee shall be liable by reason of having drawn, accepted, made or endorsed any negotiable instrument, when the same is not due at the time of service of the writ of garnishment.

(r) Effect of Judgment Against Garnishee. The judgment against a garnishee shall acquit him from all demands by the defendant for all goods, effects, and credits paid, delivered or accounted for by the garnishee by force of such judgment.

(s) Discharge of Garnishee No Bar to Action by Defendant. If the garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant for the same demand.

(t) Liability of Garnishee on Debt Not Due. When judgment is rendered against any garnishee, and it shall appear that the debt from him to the defendant is not yet due, execution shall not issue until the debt shall have become due.

(u) Plainiff May Pay Lien and Be Subrogated. When any personal property, choses in action, or effects of the defendant in the hands of a garnishee are mortgaged or pledged, or in any way liable for the payment of a debt to him, the plaintiff may, under an order of the court for that purpose, pay or tender the amount due to the garnishee, and there-

upon the garnishee shall deliver the personal property, choses in action, and effects to the sheriff, as in other cases.

(v) Subrogation; Where Pledge Held Under Condition. If the personal property, choses in action, or effects are held by the garnishee for any purpose other than to secure the payment of money, and if the contract, condition or other thing to be done or performed, is such as can be performed by the plaintiff, without damage to the other parties, the court may make an order for the performance thereof by him, and upon such performance, or a tender of performance, the garnishee shall deliver the personal property and effects to the sheriff, as in other cases.

(w) Disposition of Delivered Property; Redemption Money; Indemnity. All personal property, choses in action, and effects received by the sheriff under either of the two preceding sections, shall be disposed of in the same manner as if they had been delivered by the garnishee without condition, except that the plaintiff shall, out of the proceeds thereof, be first repaid the amount paid by him to the garnishee for the redemption of the same, or shall be indemnified for any other act or thing by him done or performed, pursuant to the order of the court for the redemption of the same.

(x) Refusal to Deliver Property. If any garnishee refuses or neglects to deliver any personal property, choses in action, or effects in his hands, when thereto lawfully required by the court, he may be adjudged in contempt.

(y) Taxation of Costs; Fees of Garnishee. The court may order the costs of the proceedings in any garnishment be paid by the plaintiff, or out of the effects or credits garnished, or by the garnishee, or may apportion the same as shall appear to be just and equitable. The garnishee shall be entitled to fees and mileage as a witness where he does not impoperly resist or make costs. (Amended and effective October 27, 1970.)

(z) Remedies of Judgment Creditors. The rights, remedy and proceedings of garnishment given by these rules to plaintiffs in attachment shall be available to judgment creditors in aid of execution. Any writ of garnishment issued in aid of execution shall state the principal amount then owing on the judgment, the interest then owing on the judgment, all costs then due and taxable against the judgment debtor, and the total of those items, which shall be the amount to be attached. The garnishment shall not be for an amount greater than this total, and the writ shall advise the garnishee that any credits, effects, debts, choses in action, money, or other personal property of the judgment debtor in the possession or control of the garnishee in excess of this total are not attached and may be released or treated in any manner as if the writ of garnishment had not been issued. (Amended and effective March 22, 1972.)

(aa) Release Upon Bond. The provisions of sections (w) and (x) of Rule 102 shall apply to proceedings under this Rule and the sheriff shall release any garnishment in accordance therewith.

APPENDIX C

Portions of the Record Showing When Federal Questions Raised:

(1) Defendants' [petitioners'] Motion to Dissolve Writs of Attachment and Writs of Garnishment filed in the District Court for the County of El Paso, State of Colorado:

> . . . Such garnishments, before judgment, without prior hearing, constitute a denial of due process of law as guaranteed by the Fourteenth Amendment to the *United States Constitution* . . .

(2) Answer Brief of the Defendants-Appellees [petitioners] filed in the Supreme Court of Colorado, p.1.:

> Rules 102 and 103 of the *Rules of Civil Procedure of the State of Colorado* are unconstitutional

in that they serve to deprive persons of their property without notice or an opportunity for a hearing, and thereby deny due process of law.

(3) Defendants-Appellees' [Petitioners'] Petition for Rehearing filed in the Supreme Court of Colorado, p.2:

> The defendants respectfully ask the Supreme Court [of Colorado] . . . to hold clearly that these rules do deny due process . . . The petitioners also respectfully ask the Court to reconsider *Sniadach, Fuentes,* and *Mitchell.* Where property is exclusively the property of the defendant, *Sniadach* and *Fuentes* apply, and prior notice and hearing are necessary. Where both the plaintiff and the defendant have an interest in the property (e.g. a vendor's lien), then *Mitchell* applies. Mitchell requires (1) a clear showing of specific facts, not a conclusory affidavit, (2) made to a judge, who issues the writ, (3) with a bond being posted, (4) a prompt hearing (within five days), and (5) recovery of damages if such attachment or garnishment is unlawful. In the instant case, the bank accounts garnished are exclusively the property of the defendants, and *Sniadach* and *Fuentes* do apply, not *Mitchell.* But even if *Mitchell* were to apply, elements (1) and (4) are not present in the instant case and are not supplied by the purported local rule.

(4) Defendant-Appellees' [Petitioners'] Petition for Rehearing filed in the Supreme Court of Colorado, p.4:

> . . . the plausible reading of the opinion is that in Colorado garnishments are valid only in the Fourth Judicial District. If so, the opinion denies equal protection of the laws, contrary to the Fourteenth Amendment to the *United States Constituition* . . .

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1057

THE COMMODITY OPTION COMPANY, INC., D. A. HARTNESS, AND JOHN McGINLEY,
Petitioners,

VS.

RUDY BERNHARDT, DR. TERRY COLLINSON, ROBERT FRASER, COL. CHARLES HAIRSTON, DR. JAMES R. KENNEDY, MAX GRINDLE, ROY PRANGLEY, ELMER WOLFE, DR. JIM WORLTON, CHARMAINE BARNEY, RAY FOSTER, JOHN FARADY, H. R. CATEY D/B/A BOZEMAN, CATEY, WYNN CAPERS, MONT S. JOHNSTON, JOHN W. CORLIS, SAM L. JEFERS, DR. IGNACIO QUIJADA, J. I. CARPENTER, & DR. A. H. VAN DERHOR,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition except to the extent that the points raised in the Argument portion of this brief affect jurisdiction.

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct.

ARGUMENT

Respondents would submit to the Court that the Petition should be denied, and in support thereof would ask the Court to consider the following points:

Point One: No Federal Question of Substance Raised. The Supreme Court of Colorado did not rule on the constitutionality of Colorado Rules of Civil Procedure 102 and 103. That Court based its decision instead upon a local directive, operative in only one county in the state, requiring that prejudgment writs of garnishment be issued by a judge, rather than by a clerk as permitted under Rule 103, Colo. R. Civ. P.

Thus the decision of the Supreme Court of Colorado affects a very limited geographic area, and no special or important reason exists for the granting of certiorari by this Court as required by Supreme Court Rule 19. See Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897.

Point Two: Rectification of Alleged Unconstitutional Action. Since the writing of its decision in this case the Supreme Court of Colorado has revised Rule 102, Colo. R. Civ. P., to such an extent that Questions 1 and 2 presented in the Petition have become moot. The complete text of the revised rule is set out in Appendix A of this Brief. The revision provides for, among other things, issuance of a writ of attachment only by a judge (paragraph e), notice to the defendant (paragraph f), and hearing within seven days (paragraph n). Since a validly issued writ of attachment is a prerequisite to the issuance of a writ of garnishment under Rule 103, the revision of Rule 102 effectively also corrects the alleged constitutional defects of Rule 103.

The revision of Rule 102 by the Supreme Court of Colorado thus makes Petitioners' Questions 1 and 2 moot and not subject to review by this Court. Socialist Labor Party v. Gilligan, 406 U.S. 583, 92 S. Ct. 1716, 32 L. Ed. 317; Rice v. Sioux City Cemetery, supra.

Point Three: Question Not Raised in State Court. Petitioners' Question 3 was not presented for consideration by the Supreme Court of Colorado. This question having been neither raised by the Petitioners below nor passed upon by the state court, it cannot be decided by this Court. Tacon v. State of Arizona, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346; Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1161, 22 L. Ed. 2d 398; Ellis v. Dixon, 349

U.S. 458, 75 S. Ct. 850, 99 L. Ed. 1231.

Point Four: Absence of Finality of Judgment. Finality of the state court judgment is essential to the availability of the remedy of certiorari. Bruce v. Tobin, 245 U.S. 18, 38 S. Ct. 7, 62 L. Ed. 123. The order of the Colorado Supreme Court in this case was a reversal of the trial court's order, and the case was remanded for further proceedings consistent with the Colorado Supreme Court's opinion. (Page 9 of the Petition.) A judgment reversing and remanding a cause for further proceeding is not final and thus cannot be reviewed by this Court. Houston v. Moore, 16 U.S. 433, 3 Wheat. 433, 4 L. Ed. 428; Morgan v. Thompson, 124 F. 203, 59 C.C.A. 672.

ARGUMENT ON MERITS

The facts of this case exemplify the absolute necessity for some type of immediate, ex parte remedy for use against those debtors who would fraudulently transfer and conceal assets in avoidance of creditors. As long as the debtor has the right to a prompt hearing to determine the likelihood of the validity of the claim against him, both parties have received the protection of the law, while at the same time due process protections are preserved. Respondents submit that the flexible due process analysis reaffirmed by this Court in Mitchell v. W. T. Grant Co. (416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed.2d 406) is the position which

offers the necessary protection to both debtor and creditor, and that the more narrow decision in North Georgia Finishing, Inc., v. DiChem (43 L.W. 4192, 95 S. Ct. 719, 42 L. Ed.2d 751) is a step in the wrong direction.

CONCLUSION

Respondents feel that the zig-zag pattern of decisions handed down by the Court in Fuentes v. Shevin (407 U.S. 67, 89 S. Ct. 198, 32 L. Ed.2d 556), Mitchel v. W. T. Grant Co., supra, and North Georgia Finishing, Inc., supra, has muddied the water of pre-judgment remedies. It was because of the need for further clarification in this area of the law that Respondents did not, at first, file a Response to the Petition for Certiorari. But because of the four points set out above in this Brief, Respondents respectfully submit that this case is not an appropriate one to assist in such clarification.

Respectfully submitted,

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APPENDIX A

Colo. R. Civ. P. 102, Vol. 1, 1970 Revision repealed and re-enacted as follows:

RULE 102. ATTACHMENTS

(a) Before Judgment. Any party, at the time of filing a claim, in an action on contract, express or implied, or in an action to recover damages for any tort committed by a nonresident of this state, against the person or property of a resident of this state, or at any time afterward before judgment, may have nonexempt property of the party against whom the claim is asserted (hereinafter defendant), attached by an ex parte order of court in the manner and on the grounds prescribed in this rule, unless the defendant shall give good and sufficient security as required by section (f) of this rule. No ex parte attachments before judgment shall be permitted other than those specified in this rule.

(b) Affidavit. No writ of attachment shall issue unless the party asserting the claim (hereinafter plaintiff), his agent or attorney, or some credible person for him, shall file in the court in which the action is brought an affidavit setting forth that the defendant is indebted to the plaintiff, or that the defendant is liable in damages to the plaintiff for a tort committed by a non-resident of this state against the person or property of a resident of this state, stating the nature and amount of such

indebtedness or claim for damages and setting forth facts showing one or more of the causes of attachment of section (c) of this rule.

(c) Causes. No writ of attachment shall issue unless it be shown by affidavit or testimony in specific factual detail, within the personal knowledge of an affiant or witness, that there is a reasonable probability that any of the following causes exist:

(1) The defendant is a foreign corporation without a certificate of authority to do business in this state.

(2) The defendant has for more than four months been absent from the state, or the whereabouts of the defendant are unknown, or the defendant is a nonresident of this state, and all reasonable efforts to obtain in personam jurisdiction over the defendant have failed. Plaintiff must show what efforts have been made to obtain jurisdiction over the defendant.

(3) The defendant conceals himself or stands in defiance of an officer, so that process of law cannot be served upon him.

(4) The defendant is presently about to remove his property or effects, or a material part thereof, from this state with intent to defraud, delay, or hinder one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(5) The defendant has fraudulently conveyed, transferred, or assigned his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process or execution unavailing if judgment is obtained.

(6) The defendant has fraudulently concealed, removed, or disposed of his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(7) The defendant is presently about to fraudulently convey, transfer, or assign his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(8) The defendant is presently about to fraudulently conceal, remove, or dispose of his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(9) The defendant has departed or is presently about to depart from this state, with the intention of having his property or effects, or a material part thereof, removed from the state.

(d) Plaintiff to Give Bond. Before the issuance of a writ of attachment the

plaintiff shall furnish a written undertaking, by a corporate surety company or by two or more sufficient sureties, in an amount set by the court in its discretion, not exceeding double the amount claimed, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages defendant may sustain by reason of the wrongful suing out of the attachment. The defendant may require the sureties to satisfy the court that each, for himself, is worth the amount for which he has become surety over and above his just debts and liabilities, in property located in this state and not by law exempt from execution.

(e) Court Issues Writ of Attachment. After the affidavit and bond are filed as aforesaid and testimony had as the court may require, the court may issue a writ of attachment, directed to the sheriff of a specified county, commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys, and effects of said defendant, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, regardless of whose hands or possession in which the same may be found.

(f) Contents of Writ and Notice. The writ shall direct the sheriff to serve a copy of the writ on the defendant if found in the county, and to attach and keep safely all the property

of the defendant within the county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's claim, the amount of which shall be stated in conformity with the affidavit. The writ shall also inform the defendant of his right to traverse and to have a hearing to contest the attachment. If the defendant's property is or may be located in more than one county, additional or alias writs may be issued contemporaneously. If the defendant deposit the amount of money claimed by the plaintiff or give and furnish security by an undertaking, approved by the sheriff, of a corporate surety company or of at least two sureties in an amount sufficient to satisfy such claim, the sheriff shall take such money or undertaking in lieu of the property. Alias writs may issue at any time, to the sheriffs of different counties.

(g) Service; How Made. The writ of attachment shall be served in like manner and under the same conditions as are provided in these rules for the service of process. Service shall be deemed completed upon the expiration of the same period as is provided for service of process.

(h) Execution of Writ. The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows:

(1) Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together

with a description of the property attached, with the recorder of the county.

(2) Real property, or any interest therein belonging to the defendant, and held by any person, or standing upon the records of the county in the name of any other person but belonging to the defendant, shall be attached by leaving with such person or his agent, if either be found in the county, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county.

(3) Personal property shall be attached by taking it into custody.

(i) Return of Writ. The sheriff shall return the writ of attachment within 20 days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto, making a full inventory of the property attached as a part of his return upon the writ.

(j) Execution of Writ on Sunday or Legal Holiday. If an affidavit or testimony is received stating that it is necessary to execute the writ of attachment on Sunday or on a legal holiday, to secure property sufficient to satisfy the judgment to be obtained, and if the court is so satisfied, the court shall endorse on the writ an order to the officer directing the writ

to be executed on such day.

(k) No Final Judgment Until 30 Days After Levy.

(1) Creditors. No final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of 30 days after such levy has been made; and any creditor of the defendant making and filing within said 30 day period an affidavit and undertaking, as hereinbefore required of the plaintiff, together with his complaint setting forth his claim against the defendant, shall be made a party plaintiff and have like remedies against the defendant to secure his claim, as the law gives to the original plaintiff.

(2) Judgment Creditors. Any other creditor whose claim has been reduced to judgment in this state may upon motion filed within said 30 days be made a party and have like remedies against the attached property. Such judgment creditor shall not be required to make or file an affidavit, undertaking, complaint, or have summons issue, provided, that any such judgment creditor may be required to prove to the satisfaction of the court that his judgment is bona fide and not in fraud of the rights of other creditors.

(l) Dismissal by One Creditor Does Not Affect Others. After any additional creditor has been made a party to the action, as hereinbefore provided, a

dismissal by the first or any subsequent attaching creditor of his cause of action, or proceedings in attachment, shall not operate as a dismissal of the attachment proceedings as to any other attaching creditor; but the remaining creditors may proceed to final judgment therein the same as though no such dismissal had been made.

(m) Final Judgment Prorated; When Creditors Preferred. The final judgment in said action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found by the court to be due, together with his costs; and the money realized from the attachment proceedings, after paying all costs taxed in the attachment action, shall be paid to the participating creditors in proportion to the amounts of their several judgments; and any surplus moneys, if any, shall be paid to the defendant by order of the court, upon proof thereof. Provided, when the property is attached while the defendant is removing the same or after the same has been removed from the county, and the same is overtaken and returned, or while same is secreted by the defendant, or put out of his hands, for the purpose of defrauding his creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors.

(n) Traverse of Affidavit.

(1) The defendant may, at any time before trial, by affidavit, traverse and put in issue the matters alleged in the affidavit, testimony, or other evidence upon which the attachment is based and if the plaintiff shall establish the reasonable probability that any one of the causes alleged in the affidavit exists, said attachment shall be sustained, otherwise the same shall be dissolved. A hearing on the defendant's traverse shall be held within seven days from the filing of the traverse and upon no less than two days' notice to the plaintiff. If the debt for which the action is brought is not due and for that reason the attachment is not sustained, the action shall be dismissed; but if the debt is due, but the attachment nevertheless is not sustained, the action may proceed to judgment after the attachment is dissolved, as in other actions where no attachment is issued.

(2) A plaintiff who fails to prevail at the hearing provided by this section is liable to the defendant for any damages sustained as a result of the issuance of process, costs, and reasonable attorney's fees. A claim for damages under this subsection may be brought as a part of the existing action, and the defendant shall be permitted to amend his answer and any counterclaim for this purpose.

(o) Amendment of Affidavit. If at the hearing of issues formed by the traverse it shall appear that the evidence introduced does not prove the cause or causes alleged in the

affidavits, but the evidence does tend to prove another cause of attachment in existence at the time of the issuance of the writ, then on motion the affidavits may be amended to conform to proof the same as pleadings are allowed to be amended in cases of variance.

(p) Intervention; Damages. Any third person claiming any of the property attached, or any lien thereon or interest therein, may intervene under the provisions of rule 24, and in case of a judgment in his favor may also recover such damages as he may have suffered by reason of the attachment of the property.

(q) Perishable Property May Be Sold. Where property taken by writ of execution, attachment, or seized under order of court, is in danager of serious and immediate decay or waste, or likely to depreciate rapidly in value pending the determination of the issues, or, where the keeping of it will be attended with great expense, any party to the action may apply to the court, upon due notice, for a sale thereof, and, thereupon the court may, in its discretion, order the property sold in the manner provided for in said order and the proceeds of said sale shall, thereupon, be deposited with the clerk to abide the further order the court.

(r) Application of Proceeds; Satisfaction of Judgment. If judgment is recovered by the plaintiff or any intervenor, on order of court, all

funds previously deposited with the clerk, or in the hands of the sheriff, shall be first applied thereto. If any balance remain due, execution shall issue and be delivered to the sheriff who shall sell so much of the attached property as may be sufficient to satisfy the judgment. Sales shall be conducted as in cases of sales on execution. If there is a personal judgment and after such sale the same is not satisfied in full, the sheriff shall thereupon collect the balance as upon an execution in other cases.

(s) Balance Due; Surplus. Whenever the judgment shall have been paid, the sheriff, upon demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

(t) Procedure When Judgment Is For Defendant. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant, the writ of attachment shall be discharged, and the property released therefrom.

(u) Defendant May Release Property; Bond. The defendant may at any time before judgment have released to him any money in the hands of the clerk or any property in the hands of the sheriff, by virtue of any writ of attachment, by executing the undertaking

provided by in section (v) of this rule. All the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall thereupon be released from the attachment and delivered to the defendant upon the delivery and approval of the undertaking.

(v) Conditions of Bond; Liability of Sheriff. Before releasing the attached property to the defendant, the sheriff shall require and approve an undertaking executed by the defendant to the plaintiff either of a corporate surety company or with at least two sureties in such sum as may be fixed by the sheriff in not less than the value of the property, to the effect that in case the plaintiff recover judgment in the action, and the attachment is not dissolved, defendant will, on demand, re-deliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will pay to the plaintiff the full value of the property so released. If a sheriff shall release any property held by him under any writ of attachment without taking a sufficient bond, he and his sureties shall be liable to the plaintiff for the damages sustained thereby.

(w) Application to Discharge Attachment. The defendant may also, at any time before trial, move that the attachment be discharged, on the ground that the writ was improperly issued,

for any reason appearing upon the face of the papers and proceedings in the action. If on such application it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

(x) New Bond; When Ordered; Failure to Furnish. If at any time where an attachment has been issued it shall appear to the court that the undertaking is insufficient, the court shall order another undertaking, and if the plaintiff fails to comply with such order within 20 days after the same shall be made, all or any writs of attachment issued therein shall be quashed. The additional undertaking shall be executed in the same manner as the original, and the sureties therein shall be jointly and severally liable with those in the original undertaking.

(y) New Trial; Appeal and Writs of Certiorari. Motions for new trial may be made in the same time and manner, and shall be allowed in attachment proceedings, as in other actions. Appeals from the county court to the district court and writs of certiorari may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases. Any order by which an attachment is released or sustained is a final judgment.

Repealed and reenacted this 19th day of December, 1974, by the Court En Banc, effective January 1, 1975.